IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-1237
[2015] NZHC 888

	BETWEEN	BURVLE EDWARD SWINDLE and CAROLIE ANN TERPENING SWINDLE as trustees of the Swindle Family Trust First Plaintiffs
		AORANGI FORESTS LIMITED Second Plaintiff
		ORAKEI SECURITIES LIMITED (in liquidation) Third Plaintiff
	AND	MARK DONALD WITHERS Defendant
	AND	ZURICH AUSTRALIAN INSURANCE LIMITED Third Party

Hearing: 26 - 29 May, 30 October and 17 November 2014

Appearances: D J Heaney QC, P A Robertson and A S Ayton for Plaintiffs
J Long, S J Davys-Brown, S G T Ma Ching and D A C Bullock for Defendant
A C Challis and H K Harkess for Third Party

Judgment: 30 April 2015

JUDGMENT OF M PETERS J

This judgment was delivered by Justice Peters on 30 April 2015 at 5.30 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors: Heaney & Partners, Auckland
Lee Salmon Long, Auckland
McElroys, Auckland

Introduction

[1] This case arises from advances that the Plaintiffs made to four companies ("Vintage companies") in 2008 and 2009. The principal advanced totalled $3,000,000 and some $2,620,000 of it, leaving aside interest, has not been repaid.

[2] The First Plaintiffs are the trustees of the Swindle Family Trust ("trustees"). The Second Plaintiff ("Aorangi") is a company wholly owned or controlled by the trustees. The Third Plaintiff ("Orakei") is a subsidiary or at least a related company of GTF Capital Limited ("GTF").

[3] The Defendant ("Mr Withers") is an accountant in private practice. The Third Party ("Zurich") is Mr Withers' insurer.

[4] The Plaintiffs' claim is for losses they contend they suffered as a result of Mr Withers' failure to honour undertakings he gave prior to the funds being advanced. Those undertakings were:[1]

> I confirm that I have been irrevocably appointed until at least the time of repayment of each loan by [borrowers], as a mandatory joint signatory to the costs account.
>
> Further, I confirm that the costs account will be utilised solely to meet the production costs specified in the costs schedule.

[5] There was some dispute at trial about the meaning of the statements made. If they mean, as I consider they do, that pending repayment Mr Withers would be required to sign every cheque drawn on the costs accounts, and that the funds in that account would be applied only to meet the production costs specified, they were false.

[6] Mr Withers was not a signatory, let alone a mandatory signatory, to the costs account. Moreover, instead of retaining the funds advanced by the Plaintiffs and applying them to the costs of production as they arose, each Vintage company immediately transferred them to related companies, Matakana Estate Limited and Goldridge Estate Limited ("Matakana" and "Goldridge"), these transfers apparently

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[1] Letter Withers Tsang & Co Ltd to Orakei Securities Ltd dated 27 March 2008, Vol 1 at 332.

being recorded in each companies' ledger as a loan by the Vintage company to the recipient.

[7] Each Vintage company defaulted in repayment of an instalment of principal and/or interest due in October 2009. In December 2010 the Plaintiffs, or rather Receivers they had appointed, communicated with Mr Withers regarding the issues giving rise to the proceedings. This led to further investigation by the Plaintiffs, to Mr Withers notifying Zurich (which to date has declined cover) and then to these proceedings.

[8] The most contentious issues between the Plaintiffs and Mr Withers concern whether or not the Plaintiffs suffered loss as a result of Mr Withers' conduct, if so in what amount and the extent if any to which the Plaintiffs have contributed to the loss. The question of whether Mr Withers breached his undertakings is relatively straightforward.

[9] Zurich declined to indemnify Mr Withers two grounds. First, Zurich submits that Mr Withers was aware of circumstances likely to give rise to a claim prior to the parties entering into the insurance contract or policy. Secondly, and alternatively, Zurich contends that indemnity for Mr Withers' conduct is excluded by the terms of the policy.

Summary of claims/result

[10] The Plaintiffs' claims are brought pursuant to s 43 Fair Trading Act 1986 ("Act"), alternatively in negligence, for negligent misstatement. Orakei's claims are brought only to the extent that the claims by the trustees and Aorangi do not succeed.

[11] I find for the trustees and Aorangi in respect of their claims under the Act, although I am satisfied that by their conduct the Plaintiffs contributed to their loss. Mr Withers is entitled to indemnity under the policy in respect of his liability.

[12] Given this decision, it is unnecessary for me to determine the Plaintiffs' claims in negligence. Were I required to do so, however, I would find that

Mr Withers owed a duty of care to the Plaintiffs; that he breached that duty; that his breach caused loss at least to the trustees and Aorangi; and that the Plaintiffs contributed to the loss by their negligence.

Issues

[13] The issues to be decided are:

Fair Trading Act 1986

(a) Was Mr Withers in trade and did he engage in conduct that was misleading or deceptive?

(b) Are the trustees'/Aorangi's claims precluded on the grounds that Mr Withers' undertakings were addressed to Orakei?

(c) Were the Plaintiffs misled or deceived?

(d) Was Mr Withers' conduct an operating or effective cause of loss suffered by the Plaintiffs?[2]

(e) Did the Plaintiffs fail to take reasonable care to look after their own interests and, if so, did that failure constitute an effective cause of loss?[3]

(f) Quantum.

Negligent misstatement

(g) Discussion

Third party proceeding

(h) Was Mr Withers' claim brought out of time?

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2 *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [29].
3 At [30].

(i) Was Mr Withers' conduct such as to otherwise disentitle him to indemnity?

Background

[14] The advances in issue are:

(a) April 2008 – $850,000 to Vintage 2008 (A) Limited and $650,000 to Vintage 2008 (B) Limited.

(b) March 2009 – $600,000 to Vintage 2009 (A) Limited.

(c) April 2009 – $900,000 to Vintage 2009 (B) Limited.

[15] I refer to the various Vintage companies as "08A", "08B", "09A" and "09B" and their predecessors likewise.

[16] The Vintage companies were associated with the Vegar family, by whom I mean Paul Vegar, Peter Vegar and Jean Vegar, Peter Vegar's wife and a chartered accountant herself. The Vegar family conducted a wine making business at Matakana through a group of companies comprising the Vintage companies, Matakana, Goldridge and others.

[17] As the companies' names suggest, the vintage for each year was produced by an A and a B company, producing different blends between them. The Vegars did not incorporate a new "A" and "B" company each year. Rather, they changed the name of an earlier company. Accordingly, 08A's previous name was 05A, and was 02A on incorporation. 09A's prior names were 06A and 03A. Likewise for the "B" companies.

[18] Each advance was made by a subsidiary of GTF, being Orakei in the relevant years. GTF was an investment capital business conducted by Mr Kingsley Turner and a colleague. GTF had a business relationship with the Vegars from 1999 onwards, having raised funds for them or their entities, for both their wine making business and for property development.

[19] The advances that Orakei made to the Vintage companies in 2008 and 2009, and indeed made from 2001 onwards, derived from the trustees or one of their entities. The trustees advanced the funds that Orakei lent to 08A and 08B and Aorangi advanced the funds lent to 09A and 09B.

[20] As I have said, the trustees' commenced lending – for onward provision to a Vintage company – in 2001. The trustees, US citizens but frequent visitors to New Zealand, were introduced to Mr Turner who proposed that they might lend funds that the Vegar family required for their wine business. After undertaking due diligence, the trustees agreed to lend.

[21] Matters in respect of the advance(s) in 2001 proceeded without difficulty and from then on the trustees made annual advances, initially to Boston Securities Limited (Orakei's predecessor) and in 2008 and 2009 to Orakei. The GTF entity then lent to the Vintage company.

[22] Principal and all interest thereon was to be repaid approximately two years after the advance was made. Within this time the vintage should be sold and sufficient funds realised to repay the loan, with another advance having been made in the intervening year. Hence the advance to 09A and 09B, even though the advances to 08A and 08B remained outstanding.

[23] The trustees'/Aorangi's advances to Orakei were on a "no-recourse" basis, so that Orakei was obliged to pay or repay the trustees/Aorangi only if and to the extent that the Vintage companies paid Orakei. That feature of the lending has led to a submission for Mr Withers that Orakei itself has not suffered "loss" for the purposes of its claims under the Act or in tort.

[24] Orakei charged the borrower, that is the Vintage company, a fee of 2.25 per cent of the principal advanced, plus GST. The fee was deducted on drawdown of the advance. Orakei also charged the Vintage company borrower a higher ordinary and default interest rate than it paid the trustees/Aorangi.

Mr Withers

[25] Mr Withers had a long association with the Vegar family. He assisted them with tax planning and the preparation of financial statements and income tax returns although Jean Vegar, an accountant, did much of the work herself.[4] Mr Withers severed his relationship with the Vegars in August 2008, that decision being prompted by an IRD audit of the Vegars' affairs. Mr Withers considered those affairs had become too complex for his practice.[5] In early 2009, however, Mr Withers was persuaded to resume acting for the family.

[26] The letter that Mr Withers wrote for the purposes of, and prior to, the advances to 08A and 08B was as follows:[6]

> 27 March 2008
>
> Boston Securities Limited
> c/- GTF Capital Limited
>
> …
>
> Dear Kingsley,
>
> I confirm that I have been irrevocably appointed until at least the time of repayment of each loan to Boston Securities Limited, by Vintage 2008 (A) Limited, and Vintage 2008 (B) Limited, as a mandatory joint signatory to the costs account.
>
> Further, I confirm that the costs account will be utilised solely to meet the production costs specified in the costs schedule.
>
> Should you require any further information, please do not hesitate to contact me.
>
> Kind regards
>
> Mark Withers
>
> …

[27] The "costs account" was the account into which each advance was paid and the "production costs specified in the costs schedule" were the costs of producing the wine. Mr Withers was supplied with and attached the costs schedule to his letter.

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4 Brief of Evidence of M D Withers dated 25 May 2014, at [3.1] to [3.4].
5 At [8.47].
6 Letter Withers Tsang & Co Ltd to Boston Securities Ltd dated 27 March 2008, Vol 1 at 325. Nothing turns on the reference to Boston Securities Ltd, a predecessor of Orakei.

[28] Mr Withers' letter in respect of the advances in 2009 was in the same form and dated 11 March 2009, and likewise attached a costs schedule.[7]

[29] Mr Withers did not charge any fee for the provision of his undertakings. He was never a mandatory signatory to any of the costs accounts, although he was a signatory in 2003 and may have signed the occasional cheque. Peter and/or Paul Vegar were the signatories to the costs accounts.

Costs schedules

[30] The costs schedules that Mr Withers attached to his letters were incorporated in each facility agreement between Orakei and the Vintage company borrower. They record the costs to which each advance was to be applied and when these were expected to be incurred.

[31] Taking 08A as an example, production costs comprised "Purchase Juice", "Freight", "Set up Costs" and "Bottling".[8] The first three of these items, totalling approximately $670,000, were to be incurred in the quarter ended June 2008.

[32] "Bottling" expenses, approximately $235,000, were to be incurred between September 2008 and March 2010. Wine was bottled as required and so payment of a bottling fee invariably signified a sale. Each vintage company was a party to a "take or pay" supply arrangement with Goldridge, that is 08A was to sell and Goldridge to purchase all wine produced by 08A.[9]

[33] The payments due from Goldridge were set at an amount sufficient to meet the Vintage companies' costs but no more than that, that is to repay the principal, pay the interest costs and pay expenses to the extent they might exceed the advance. 08A's costs schedule assumed receipts of $1,109,854 from sales to Goldridge between March 2009 and June 2010.

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7 Letter Withers Tsang & Co Ltd to Boston Securities Ltd dated 27 March 2008, Vol 1 at 327.
8 Costs Schedule, Vol 1 at 328.
9 Supply Agreement dated 8 April 2008, Vol 2 at 519.

[34] In evidence, Mr Withers said that he believed he was committing to be a signatory to the costs accounts and that he relied upon the Vegars to make the necessary arrangements. If he were presented with a cheque to sign, he would ensure it was to pay a cost of production. I accept the Plaintiffs' submission that Mr Withers' letter conveyed a different meaning, as to which see the discussion below of s 9 of the Act.

[35] The first statement in Mr Withers' letters is a statement of fact. However, two issues arise as to the second statement in the letter, regarding the use to which funds in the costs accounts would be put. First, this is a promise as to a future course of conduct. No submissions were made to me on whether a failure to honour such a promise may constitute misleading or deceptive conduct for the purposes of s 9 of the Act. I do not, however, consider anything turns on the point for present purposes. Chambers J addressed this issue in *Gunton v Aviation Classics Ltd*,[10] in turn referring to a decision by Toohey J in Australia in *James v Australia and New Zealand Banking Group Limited*,[11] to the effect that a statement relating to the future may contain an implied statement as to a present or past fact. Mr Withers' statement that he had been irrevocably appointed as a mandatory joint signatory was an express statement which conveyed that he could perform his promise as to how the funds would be applied.

[36] As to the other point, the second statement in the letter refers to the "costs account". This has been assumed to mean all funds in the costs account, rather than to the funds advanced by Orakei. That latter construction would be consistent with terms of the facility agreement between Orakei and each Vintage company (see below) but inconsistent with the first statement in the letter, which was to subsist until repayment. The point might have become important in the context of evidence at trial as to a breach of the undertakings in 2010, that is long after the advances had been drawn down and indeed after default. For reasons given below, however, I consider the loss arose before 2010 and so nothing now turns on the point.

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10 *Gunton v Aviation Classics Ltd* [2004] 3 NZLR 836, at [240].

11 *James v Australia and New Zealand Banking Group Limited* (1986) 64 ALR 347 at 372.

[37] Mr Withers acknowledged in evidence that he knew his undertakings were to be relied upon by the lender and that they were required before the Vintage companies could draw down the advances. Mr Withers would have known this from the outset. Mr Withers' first letter, in 2001, was written in a response to a request from Peter Vegar,[12] in which Mr Vegar made clear why the undertaking was required and set out a draft of the letter. Moreover, from time to time, GTF requested amendments to the form of Mr Withers' letter and in 2003 GTF wrote to Mr Withers directly to seek confirmation of his appointment.

[38] The import of his undertakings must have occurred to Mr Withers shortly after he sent his letter in 2009 because he emailed Jean Vegar as follows:[13]

> ...
>
> Can I clarify something please....
>
> The letter I have signed for the Vintage companies confirms I am a mandatory signatory but I don't ever recall actually signing any payments on the accounts. Are we actually operating this in accordance with the confirmation I have given?
>
> Are they assuming I am signing all payments?

[39] Mr Withers did not receive a reply to this email and he did not raise the matter again.

[40] Mr Turner's evidence as to the purpose for which the undertakings were sought was:[14]

> 10. ... The Vintage Companies were single-purpose entities as their only business was to pay Matakana Estate Limited (**Matakana**) for the making of wine and to receive sufficient of the sales proceeds to repay money loaned by Orakei. It was intended that the Vintage Companies had no other assets and would have no other liabilities.

[41] Mr Turner said that he had been anxious to ensure:[15]

> 20. … that there was control of the use of the money. The management and business operations of the Vegar companies were intertwined

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12 Facsimile Matakana Estate to Withers Tsang & Co Ltd dated 24 May 2001, Vol 1 at 145.
13 Email M Withers to J Vegar dated 11 March 2009, Vol 1 at 359.
14 Brief of Evidence of S K E Turner dated 26 May 2014, at [10] and [11].
15 At [20].

> with common directorships, whilst the assets of these companies were subject to charges and other security arrangements. This is why I required a person such as Mr Withers to be involved in supervising payments made by the Vintage Companies. I anticipated that having Mr Withers as co-signatory with a list of wine related expenses would ensure that the money was not diverted elsewhere."

and that he:[16]

> 21. ... discussed this aspect of the financing with [the trustees] in 2001 when explaining to them the precautions taken to ensure that their investment was safe. I confirmed to them in each year following that the undertaking by Mr Withers remained an important part of the lending structure. I would certainly have told them if Mr Withers had not been co-signatory as arranged and anticipated.

[42] In her evidence, Mrs Swindle confirmed that the trustees knew of the undertakings given by Mr Withers and that and that the trustees relied on those undertakings in making their advances to Orakei.

[43] Mr Turner made enquires which confirmed Mr Withers' good standing and reputation.[17] That said, Mr Turner did not meet or speak to Mr Withers at any time, expect possibly by telephone in early 2001.

Contractual arrangements

[44] The restrictions on the use of funds that the Plaintiffs sought, and their requirements of Mr Withers, were reflected in the contractual arrangements between the parties. Again taking 08A as an example, the Term Loan Facility Agreement between Orakei and 08A ("facility agreement") required 08A to apply the funds to pay costs incurred in producing wine:[18]

> 2.3 **Purpose:** The proceeds of each Advance shall be applied by the Borrower solely for the purposes of meeting costs detailed in the Costs Schedule and not for any other purpose or for any unlawful purpose.

and:[19]

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16 At [21].
17 At [21], [23] and [24].
18 Term Loan Facility Agreement dated 8 April 2008, Vol 2 at 408.
19 At cl 2.4.

> 2.4 **Advances:** The Borrower acknowledges and agrees that each Advance … shall be deposited into an account with a bank acceptable to the Lender (the "Costs Account"), which account shall be established solely for the purposes of meeting the costs specified in the Costs Schedule. Mark Withers is to be designated as a mandatory signatory to the Costs Account.

[45] The Costs Schedule was attached to the agreement and was the same as that attached to Mr Withers' letter.

[46] The condition precedent which provided for Mr Withers' undertakings was in clause 26.1 of the facility agreement:[20]

> **26. CONDITIONS PRECEDENT**
>
> 26.1 Prior to the Lender making the Facility available to the Borrower, the Borrower shall provide to the Lender the following:
>
> (a) evidence that Mark Withers of Withers Tsang & Co, chartered accountants has been irrevocably appointed by the Borrower as a mandatory joint signatory to the Costs Account; and
>
> (b) a written undertaking from Mark Withers of Withers Tsang & Co that the Advance held in the Costs Account will be utilised solely to meet the production costs specified in the Costs Schedule.

[47] Moreover, Orakei was entitled to call up the advance and exercise all its rights if amongst other things:[21]

> 13.16 **Mark Withers:** Mark Withers ceases to be a mandatory joint signatory for the Costs Account; …

[48] As mentioned, Mr Withers' undertaking goes further than the terms of clause 26.1(b) if it applies to all funds in the costs accounts, by whomever and whenever deposited. The condition precedent applies only in respect of the advance.

[49] Counsel for Mr Withers submitted that the Plaintiffs were negligent in failing to obtain evidence, either from the relevant bank or 08A, as to satisfaction of clause 26.1(a). I do not accept that submission. Mr Withers' letters were

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[20] At cl 26.1.
[21] At cl 13.16.

unequivocal, he was a chartered accountant and the Plaintiffs were entitled to rely upon the letters without requiring additional evidence.

[50] I have already referred to the Supply Agreement between the Vintage company and Goldridge. The only other matter I mention is that, although the payments from Goldridge were 08's sole source of income, the facility agreement did not require those payments to be paid into the costs accounts and/or for 08A to apply them to repaying the advance. This was a significant omission because the Vintage company would not have been in breach of its obligations to Orakei if it had deposited the proceeds of sale into another account and applied them to a different purpose. Although Mr Withers might have declined to authorise payment of bottling costs if he had not been assured the proceeds of the sale would be paid into the account, the Plaintiffs were not entitled to insist on it.

[51] In addition to the above, the Vegars guaranteed the performance by Goldridge of its obligations under the Supply Agreement and guaranteed the borrower's performance of its obligations under the facility agreement.[22] Orakei also held a Deed of General Security over the borrower's assets and undertaking.[23] This Deed vested in Orakei powers that might be exercised in the event of default. Orakei did not exercise those powers and this is a matter to which I return in considering the extent to which the Plaintiffs contributed to their loss.

Contractual documents as between the trustees and Orakei (Aorangi)

[52] The terms on which the trustees/Aorangi advanced funds to Orakei were also recorded in facility agreements between those parties.[24] As I have said, the trustees/Aorangi were only to be paid interest/recover their principal to the extent the Vintage company borrower paid the same to Orakei. Orakei also assigned its rights to the trustees/Aorangi.

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22 Guarantee and Indemnity dated 8 April 2008, Vol 2 at 503 and 486.
23 General Security Deed dated 8 April 2008, Vol 2 at 437.
24 Facility Agreement undated, Vol 2 at 537.

Draw down

[53] As appears from the following paragraphs, the Vintage companies did not retain the funds advanced to them in the costs accounts but paid them, immediately, to Matakana and Goldridge. Within the group these payments were recorded as loans from the 08 and 09 companies to Matakana and Goldridge. The payments were in breach of the terms of the facility agreements and of Mr Withers' undertaking.

08A and 08B

[54] Orakei advanced:

(a) $500,000 (less fees) to 08A and to 08B on 9 April 2008;

(b) $350,000 to 08A and $150,000 to 08B on 11 April 2008.[25]

[55] Each company had less than $10 in their account prior to drawdown.

[56] Between 10 April and 20 May 2008:

(a) 08A paid $470,000 to Goldridge and $350,000 to Matakana;[26] and

(b) 08B paid $400,000 to Goldridge and $225,000 to Matakana.[27]

[57] The balances in the accounts after the transfers were $4,078.12 and $3,436.48 respectively.

[58] On the face of the bank statements it may be that some or all of these payments were made by internet banking, rather than by cheque. In the absence of argument, my view is that a recipient of Mr Withers' undertakings would understand

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25 Vintage 2008 (A) Ltd Bank Statements and Vintage 2008 (B) Ltd Bank Statements account for 03-0481-0146958-02 and 03-0481-0146958-03 respectively, at 1011 and 1087.

26 Vintage 2008 (A) Ltd Bank Statements, Vol 4 at 1011 and 1013.

27 Vintage 2008 (B) Ltd Bank Statements, Vol 4 at 1082 and 1084.

that he would control all payments out of the account, whether by cheque or otherwise.

09A

[59] Orakei advanced $600,000 (less fees) to 09A on 13 March 2009.[28] 09A had $55 in its account prior to this deposit.

[60] On the same day, a "Requested Transfer" of $220,000 was made and two cheques (100032 and 100033) presented against the account, for $250,000 and $100,000 respectively. It is common ground that these payments, which total $570,000, were to Matakana and/or Goldridge. The payments reduced the balance in the account to approximately $10,000.

09B

[61] Orakei advanced $900,000 (less fees) to 09B on or about 12 March 2009.[29] The balance in the account prior to the advance was about $100.

[62] Following the deposit, 09B's bank statements record a "Requested Transfer" of $820,000 and an internet payment to "Multiple Payees" of $50,000. Again, it is common ground that these payments, totalling $870,000, were to Matakana and/or Goldridge and they reduced the balance in the account to $2,600.

Event of default and subsequent steps

[63] Prior to October 2009 08A and 08B made payments under the facility agreements as they fell due, including principal of $110,000 from 08A and $270,000 from 08B. The principal that remains outstanding is $2,620,000.

[64] Default occurred under all facilities in October 2009.

[65] Following default, Paul and Peter Vegar advised Mr Turner that the market for wine was "soft", and that there was delay in receiving payments from their

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[28] Vintage 2009 (A) Ltd Bank Statements for 03-0481-0146923-00, Vol 4 at 1153.
[29] Vintage 2009 (B) Ltd Bank Statements for 03-0481-0146931-01, Vol 4 at 1203.

debtors. The Plaintiffs agreed to defer payments due under the loans if additional security by way of a mortgage over land were made available. This did not eventuate or was unsatisfactory. There was also discussion of a sale of the business but nothing came of this.

[66] Mr Turner's evidence was that he did not have any "specific concerns" whilst these discussions were underway, because he expected the sale of wine stock to realise sufficient funds for the purposes of repayment of the advances. This expectation was not fulfilled. Some wine stock from the 2009 vintage existed and was in vats at Matakana's premises. Liquidators were appointed to Matakana in November 2010 and they claimed ownership of the stock. This led to litigation between, inter alia, the Receivers of the 09 companies on the one hand (appointed in December 2010) and the liquidators on the other.[30]

[67] The proceedings came before Kós J in 2012. The Judge identified that part of the stock that was owned by the 09 companies. Following Kós J's decision, the Plaintiffs sold such interests as they had in the wine stock for $200,000. The cost of the proceedings was such that there was no net recovery by the Receivers from this $200,000.

[68] Whilst the discussions to which I have referred in [65] above were ongoing, and between February and September 2010, funds were being paid into the Vintage companies' costs accounts and were then being paid out to other group companies. The expert accountants who gave evidence at trial agreed that there was a degree of circularity in these payments but, again, on their face the payments out of the costs accounts constitute a breach of Mr Withers' undertaking.

[69] In July 2010 the IRD wrote to Mr Withers' firm threatening liquidation of 07A and 07B in respect of GST arrears. The communications from the IRD gave Mr Withers cause for concern as to the financial position of the Vintage companies and "what this might mean given the confirmation letters that had been given".[31]

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30 *Swindle v Matakana Estate Ltd (in liq)* [2012] 1 NZLR 806, [2012] NZCCLR 4.

31 Brief of Evidence of M D Withers, above n 4, at [9.3].

Mr Withers made enquiry of the Vegars who assured him that all loans from Orakei had been repaid.

[70] In November 2010, the Vegars passed shareholder resolutions to wind up Matakana and Goldridge.

[71] Orakei appointed receivers ("Receivers") to all of the Vintage companies on 9 December 2010.

[72] On 16 December 2010, Mr David Taylforth, who was assisting the Receivers, telephoned Mr Withers and enquired as to payments made out of the costs accounts. Mr Withers advised that he had not been required to sign cheques and did not have the information Mr Taylforth sought. The following day Mr Withers notified his insurance broker of a possible claim.

[73] Mr Withers' advice led Mr Taylforth to carry out a review of the bank statements for the costs accounts and other documents, as a result of which the lump sum payments to Matakana and Goldridge became apparent.

[74] The Vintage companies were placed into liquidation on 10 August 2011.

[75] The Plaintiffs obtained judgment under the guarantees against Paul, Peter and Jean Vegar. Efforts to enforce the judgments yielded nothing. Paul Vegar declared himself bankrupt. Peter and Jean Vegar put a compromise to creditors.

[76] The trustees commenced proceedings against Mr Withers on 7 March 2012. Aorangi was joined on 26 April 2013. Orakei was joined to the proceedings on 19 February 2014.

Evidence

[77] In May 2014, I heard evidence from Mrs Swindle, Mr Turner, Mr Withers, Mr Grant Graham, Mr Taylforth, Mr Anthony Hoksbergen and Mr Andrew McKay. Mr Graham gave expert evidence as to Mr Withers' performance of his obligations. Mr Taylforth gave expert evidence of matters he had ascertained as to the transfer of

funds from the costs accounts in 2008, 2009 and 2010. Mr Hoksbergen, an expert in the wine trade, gave evidence for Mr Withers as to conditions prevailing in the industry between 2008 and 2010. Zurich called Mr McKay, an accountant, to give his view on Mr Withers' failures to comply with his obligations.

[78] The Plaintiffs' case at the hearing in May 2014 was that Mr Withers had breached his undertakings by allowing the payments from the costs account in 2008 and 2009, and then again in respect of the payments to which I have referred in [68] above. Mr Taylforth gave evidence that the deposits to the costs accounts in 2010 were approximately $2.8 million, and so exceeded the principal outstanding under the various advances. The Plaintiffs submitted that, had Mr Withers complied with his undertaking, that sum would have been retained in the costs accounts for recovery by the Receivers.

[79] Counsel for Mr Withers put it to Mr Taylforth that the $2.8 million largely comprised "recycled" funds and could not be considered as the sum that would have been in the costs accounts had Mr Withers complied with his undertakings. That exchange led to an application by Mr Withers to adduce further evidence. I granted leave and in October and November 2014 heard evidence from Mr Charles Lyne for Mr Withers and further evidence from Mr Graham, as Mr Taylforth was unavailable.

[80] In the course of preparing the additional evidence, the parties obtained more information by way of bank statements, financial statements and general ledgers. Mr Lyne's analysis of these and other documents was that the vast majority of the 2010 payments to which Mr Taylforth had referred were circular and that no more than $650,000, and possibly less, would have been in the costs accounts on receivership had Mr Withers complied with his undertaking and the funds been retained in the accounts.

[81] Mr Graham's evidence focused on the financial position of the group at the time the advances in 2008 were made. Mr Graham's evidence was that, by 2008, Matakana and Goldridge had traded at a loss for many years, that their losses

between 2001 and 2008 exceeded $5 million and that they had been "propped up" throughout, by the Vegars from their own resources and the Plaintiffs' advances.[32]

[82] I did not hear any evidence from Paul, Peter or Jean Vegar. I have reservations as to the reliability of the financial statements and the general ledgers. Not only are the latter incomplete but many entries would require explanation from the Vegars before they could be relied upon.

Claims under Fair Trading Act 1986

[83] Each Plaintiff seeks relief under s 43 of the Act. To obtain relief under s 43, the Plaintiffs must first prove a breach of, in this case, s 9 of the Act and then prove that they suffered loss "by" the conduct in breach.[33] If those two matters are proved, pursuant to s 43(2)(d),[34] the Court has discretion to order Mr Withers to pay the amount of the loss.

[84] The relevant part of s 43 provides:

> **43 Other orders**
>
> (1) Where, in any proceedings under this Part of this Act, or on the application of any person, the Court finds that a person, whether or not that person is a party to the proceedings, has suffered, or is likely to suffer, loss or damage by conduct of any other person that constitutes or would constitute—
>
> (a) A contravention of any of the provisions of Parts 1 to 4 of this Act; or
>
> ...
>
> the Court may ... make all or any of the orders referred to in subsection (2) of this section.
>
> (2) For the purposes of subsection (1) of this section, the Court may make the following orders—
>
> ...

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32 Second Brief of Evidence of G R Graham dated 17 October 2014, at [16].

33 *Red Eagle Corporation Ltd v Ellis*, above n 2, at [28] and [29].

34 Section 43 has since been amended and wording to the same effect is now found in s 43(3)(f). For this judgment I refer to the section as it appeared at the time of the relevant events.

> (d) An order directing the person who engaged in the conduct, referred to in subsection (1) of this section to pay to the person who suffered the loss or damage the amount of the loss or damage:

Section 9 Fair Trading Act 1986

[85] Section 9 of the Act provides:

> **9 Misleading and deceptive conduct generally**
>
> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[86] The Plaintiffs' case is that Mr Withers was in trade and that he engaged in misleading or deceptive conduct by failing to advise that he had never been a mandatory joint signatory to the costs account(s), and in giving and failing to honour his undertakings in 2008 and 2009.

[87] In *Red Eagle Corporation Ltd v Ellis*, the Supreme Court said:[35]

> [28] ... The question to be answered in relation to s 9 in a case of this kind is accordingly whether a reasonable person in the claimant's situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived. If so, a breach of s 9 has been established. … the fact that someone was actually misled or deceived may well be enough to show that the requisite capacity existed.

[88] There can be no dispute that Mr Withers was in trade for the purposes of the Act (see s 2 of the Act) nor, in my view, that he engaged in conduct that was misleading or deceptive.

[89] Mr Withers' letters conveyed that his signature would be required on every cheque drawn on the costs accounts, that this requirement would subsist until repayment of the loans referred to in the letters and that the funds in the costs accounts would be disbursed only to pay costs of production specified in the costs schedule. Given that Mr Withers' signature was not required and that he was unable to control the application of the funds, a reasonable person in the Plaintiffs' situation would have been misled or deceived and a breach of s 9 has been proved.

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[35] *Red Eagle Corporation Ltd v Ellis*, above n 2, at [28] (footnotes omitted).

Section 43 Fair Trading Act 1986

[90] Having established a breach of s 9, the Plaintiffs must then prove that they have suffered loss "by" that breach. Before coming to this matter, however, it is necessary to address a submission made by counsel for Mr Withers, to the effect that the trustees' and Aorangi's claims under s 43(1) could not succeed because Mr Withers' undertakings were not addressed to them but to Orakei.

[91] I do not accept this submission. What a claimant under s 43 must prove is that they suffered loss or damage "by" the conduct of the defendant:

> **43 Other orders**
>
> (1) ... a person ... has suffered, or is likely to suffer, loss or damage by conduct of any other person ...

[92] In *Commerce Commission v Bennett & Associates Ltd*,[36] the Court of Appeal considered whether the fact that the valuations in issue in that case were addressed to a third party precluded recovery. The Commerce Commission was seeking to recover losses suffered by purchasers who had entered into agreements to purchase residential properties, conditional as to finance. Bennetts prepared valuations to support the purchasers' applications for finance. Those valuations were addressed and provided to the lenders, not the purchasers. The valuations were inflated, had the effect of rendering the purchases unconditional and caused loss to the purchasers. The Court of Appeal held that the causal link required between Bennetts' conduct and the purchasers' loss was established. The fact that the valuations were addressed to the proposed lender was immaterial.

[93] Likewise in this case. The trustees and Aorangi knew of Mr Withers' undertakings prior to putting Orakei in funds and they would not have advanced funds to Orakei in the absence of Mr Withers' undertakings.

[94] It is unnecessary for me to determine two further submissions made by counsel for Mr Withers in opposition to Orakei's claim under s 43(1). The first of these was that Orakei could not succeed because it had not suffered a "loss", given

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[36] *Commerce Commission v Bennett & Associates Ltd* (1996) 6 TCLR 691.

the no recourse nature of the trustees' and Aorangi's advances. Determination of that issue is best left to a proceeding in which the answer may be critical.

[95] The other submission for Mr Withers was that Orakei's claim, commenced on 19 February 2014, was made out of time. Section 43(5) of the Act (since amended) provides:

> An application under subsection (1) may be made at any time within 3 years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.

[96] Although it is unnecessary for me to determine this point, having regard to the chronology of events set out from [63] onwards, I accept that there are good grounds for the submission that Orakei ought reasonably to have discovered loss or its likelihood prior to 19 February 2011.

Loss

[97] I find as a fact that the Plaintiffs were misled or deceived by Mr Withers' conduct.[37]

[98] The Plaintiffs submit that they have suffered a loss of principal of $2,620,000 plus interest (there is an issue as to the correct measure) less recoveries. The only recovery of which I am aware is the $200,000 paid by the liquidators of Matakana, which in any event was spent on pursuing the proceedings.

[99] The Plaintiffs submit that they would not have made the advances in the absence of the undertakings and seek an order requiring Mr Withers to reimburse them for their entire loss.

[100] Alternatively the Plaintiffs submit that the measure of their loss is the amount which would have been in the costs accounts on receivership, had Mr Withers complied with his undertakings and only authorised payments from the costs accounts that were required to meet costs of production. In reality there is little difference between these two methods of assessing loss on the facts of this case.

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[37] *Red Eagle Corporation Ltd v Ellis*, above n 2, at [29].

That is because the Vintage companies paid all the funds away as soon as they were received from Orakei.

[101] Mr Withers' case is that he undertook to apply funds in the costs accounts to meet costs of production. Although this undertaking was not observed, in fact Matakana and Goldridge did apply funds (on Mr Withers' submission) to costs of production. Mr Withers' submission is that it does not matter whether the Vintage companies paid those costs as and when they fell due, or whether the Vintage companies "prepaid" them by its transfers to Matakana and Goldridge. Counsel for Mr Withers also submits that, even if Mr Withers' conduct is found to have caused loss, the Plaintiffs contributed to that loss by failing to take reasonable care to look after their interests.

Discussion

[102] In *Red Eagle* the Court said:[38]

> [29] ... moving to s 43, the court must look to see whether it is proved that the claimant has suffered loss or damage "by" the conduct of the defendant. … The court must first ask itself whether the particular claimant was actually misled or deceived by the defendant's conduct. … If the court takes the view, usually by drawing an inference from the evidence as a whole, that the claimant was indeed misled or deceived, it needs then to ask whether the defendant's conduct in breach of s 9 was an operating cause of the claimant's loss or damage. Put another way, was the defendant's breach *the* effective cause or *an* effective cause? ... The impugned conduct, in breach of s 9, does not have to be the sole cause, but it must be an effective cause …
>
> [30] Another operating cause of loss or damage may perhaps have been the claimant's own conduct in failing to take reasonable care to look after his or her own interests. The court should therefore ask itself whether the claimant's carelessness, if there were any, should be regarded as the sole or a contributory operative cause of the loss. …

[103] Accordingly, it is necessary for me to determine whether Mr Withers' conduct was "the effective cause or an effective cause" of the Plaintiffs' loss.

[104] There is little evidence that wine was produced in 2008 using the funds advanced, let alone in what quantity and at what cost. Mr Taylforth appears to have

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[38] *Red Eagle Corporation Ltd v Ellis*, above n 2, at [29] and [30] (footnotes omitted).

proceeded on the basis that Matakana and Goldridge produced some wine at least in 2008. However, Mr Graham expressed doubts and, as I have said, he and Mr Lyne had the benefit of more extensive documentation. Mr Graham's view was that Matakana and Goldridge had applied the funds, or a substantial part of them, to other purposes.

[105] The position appears to be different in respect of 2009. As I have said, the Receivers' submission before Kós J was that the 09 companies' "loans" had paid for some or all of the wine in dispute, although quite how much was so applied is not apparent.

[106] Regardless, even allowing for such production as might have occurred, there was benefit to the Plaintiffs in the performance of the undertaking, that benefit being retention of the funds unless and until applied to production costs. If there were a default, then the remaining portion of the funds could be expected to be in the costs accounts.

[107] I also accept Mr Graham's evidence that Matakana and Goldridge would have collapsed, and quickly, had Mr Withers performed his undertaking after draw down of the advances to the 08 companies. In that case, a substantial proportion of the funds advanced to 08A and 08B would have been in the costs accounts for recovery by the Plaintiffs and in all likelihood the Plaintiffs would not have made an advance in 2009. I accept the Plaintiffs' submission that they relied on Mr Withers' undertakings in making the advances and that, absent those undertakings, the advances would not have been made or the Plaintiffs would have required an undertaking to similar effect from a third party satisfactory to them.

[108] Taking into account all of the matters referred to above, Mr Withers' conduct was an effective cause of the Plaintiffs' loss.

Plaintiffs' conduct

[109] The next issue is whether the Plaintiffs contributed to their loss by their conduct prior to and after default. In considering this issue, I attribute conduct by Orakei and GTF to the trustees and Aorangi. In essence, Mr Turner acted as the

agent or representative for the trustees and Aorangi for the purposes of making and managing the advances.

[110] The relevant matters are as follows.

[111] First, Orakei was on notice prior to default that the Vintage companies were making loans to Matakana and Goldridge. Mr Turner's evidence was that he received financial statements not only for the Vintage companies but also Matakana and Goldrige.

[112] By way of example, on 3 July 2008, and at GTF's request, Mr Withers supplied the financial statements for the 05, 06 and 07 companies for the year ended 31 March 2007.[39]

[113] Amongst other things, 05A's financial statements recorded a loan of more than $93,000 to 07B.[40] Note 6 to the statements says:[41]

> **6. Related Party Transactions**
>
> During the year Vintage 2005 (A) Limited has been involved in advances to/from [Matakana], [Goldridge], Vintage 2005 (B) Limited, Vintage 2006 (A) Limited, Vintage 2006 (B) Limited, Vintage 2007 (B) Limited and The Vines Development Company Limited, which are companies that Jean and Peter Vegar have a shareholding interest in.

[114] Similarly, 05B's financial statements for the same period record a loan of more than $93,000 to 07B in the previous financial year and a loan to 07A of more than $70,000 in the year ended 31 March 2007.[42] The notes to the financial statements likewise recorded 05B's "involvement" in advances to other group companies.

[115] Mr Turner's evidence was that these loans did not give him any concern because of the reliance he placed on Mr Withers.[43] However, there was no scope for the Vintage companies to make loans, whether to Matakana, Goldridge or to any

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39 Vintage Financial Statements, Vol 1 at 336
40 Vintage 2005 Financial Statements, Vol 7 at 2283.
41 At 2288.
42 At 2294.
43 Evidence of S K Turner at 125.

other company, if Mr Withers was performing his undertakings. The financial statements should have put Orakei on enquiry.

[116] Secondly, Orakei was on notice some nine months prior to default that there might be a shortfall in funding for the group. In about December 2008, Peter or Paul Vegar advised Mr Turner that a Vintage company or companies would default on principal and interest due to Orakei or Boston that month. They sought funding to cover the shortfall. GTF arranged an advance, subsequently repaid. Mr Turner did not advise the trustees of the request nor of the provision of funding.

[117] It was put to Mr Turner that this request must have caused him to be concerned as to the financial standing of the group. Mr Turner's evidence was that it did not and that he considered the request:[44]

> … a positive indicator that the family was willing to come in and put up first mortgage security over property assets to solve the timing difference.

[118] Despite this evidence, I am satisfied that the Vegars' acknowledgment of a shortfall required increased vigilance and more expeditious action when the Vintage companies did default some 10 months later.

[119] Thirdly, the Plaintiffs did not appoint Receivers until December 2010, some 14 months after default. Mr Turner's evidence was that a "level of trust" existed between the parties because the Vintage companies had performed their obligations in respect of previous advances and that, as a result, the Plaintiffs did not take "more formal enforcement" steps.[45] Nor did the Plaintiffs wish to jeopardise their prospects of recovery by appointing Receivers.

[120] A creditor faced with a default may be entitled to some leeway as to if and when they enforce following default. In this case, however, the Plaintiffs must bear some of the consequences of their delay. As counsel for Mr Withers' submitted, the Plaintiffs were entitled to exercise particular powers under the Deed of General Security which might have yielded increased recoveries. For instance, I have already referred to Mr Taylforth's evidence as to the movement of funds in the costs account

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44 At 135.
45 At 120.

in 2010, after default and prior to receivership. Even on Mr Lyne's evidence, more than $500,000 and as much as $650,000 was "fresh" rather than "recycled or recirculated" funds. It was open to Orakei to require that Goldridge pay all sums due under the Supply Agreement directly to Orakei.[46]

[121] In cross examination Mr Turner acknowledged that, after Receivers were appointed, it became apparent that the Vegars had been "dishonest"[47] and that they diverted the Plaintiffs with various proposals in the period between default and receivership, whilst they:[48]

> … were merrily getting on with stripping the money out of the Vintage entities.

[122] Mr Turner said he did not consider the possibility of the Vegars taking funds from the companies because of the "control mechanisms" in place. However, neither Mr Turner nor the Plaintiffs communicated with Mr Withers until 16 December 2010,[49] and as I have said they did not take steps to secure the costs accounts.

[123] I have already addressed Mr Turner's expectations of recovery from wine stock on hand. The only other point to make on this matter is that the Plaintiffs did not have possession of the wine stock and there is no evidence that they sought to secure or sell it prior to receivership.

[124] Taking all of these matters into account, I am satisfied that the Plaintiffs' conduct was also a cause of loss.

Apportionment

[125] It is necessary to assess the parties' contributions to the loss suffered. The apportionment of the Judge at first instance in *Red Eagle* was described as a "broad-brush" and mine is similarly broad-brush.[50] I consider that Mr Withers should bear half of the Plaintiffs' loss and the Plaintiffs the other half.

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46 General Security Deed, above n 23, cl 3.12.
47 At 83.
48 At 120.
49 At 121.
50 *Red Eagle Corporation Ltd v Ellis*, above n 2, at [39].

[126] I have already set out the components of the Plaintiffs' loss. To the extent that the Vintage companies defaulted in instalments of interest (as I understand it, from October 2009), interest on the outstanding principal is allowed at the rate paid from time to time on funds in the costs accounts until the date the trustees commenced proceedings. This measure is consistent with performance of the undertakings. Thereafter interest accrues at the Judicature Act 1908 rate.

[127] I have disregarded the $200,000 recovery arising from the payment by the liquidators of Matakana. There is no evidence before me that the costs incurred in achieving that recovery were unreasonable.

2010

[128] For the sake of completeness I record my views on the evidence as to the payments made from the costs accounts in 2010.

[129] Mr Lyne analysed the bank statements for the Vintage companies, Matakana, Goldridge and Dream Bay Limited over a 21 day period between February and March 2010. He concluded that up to $649,506 of the funds deposited during that period were "fresh", with the balance "recirculated" between accounts. In short, had Mr Withers complied with his undertakings in 2010, at most some $650,000 would have been retained in the costs accounts.

[130] I am not satisfied that it is possible to be definitive as to the sum which could be described as fresh and that which could not. The analysis carried out by Mr Lyne requires the tracing of numerous transfers of funds from the costs accounts to bank accounts for, say, Matakana, from there to Goldridge, from there to Dream Bay and so on, in the course of which funds are said to have been supplemented or reduced, before one or other company makes another deposit to a costs account – at which point the process starts again. There is a degree of speculation in the evidence (with no disrespect to Mr Lyne) which I consider renders it unreliable, at least in part.

[131] In any event, it is unrealistic to think that all of the payments identified by Mr Taylforth and Mr Lyne would have continued if in 2010 Mr Withers had complied with the undertaking and refused to authorise transfers of funds. The

transfers to the Vintage companies would have ceased as soon as Mr Withers declined to pay the funds away.

[132] For that reason, I have not found the evidence as to what occurred in 2010 helpful in determining the issues as to loss.

Conclusion on claims under the Fair Trading Act 1986

[133] Mr Withers breached s 9 of the Act. His conduct was an effective cause of loss suffered by the trustees and Aorangi. The Plaintiffs' own conduct contributed to their loss. The loss comprises the outstanding principal of $2,620,000 and interest at the rates and for the periods referred to in [126] above.

[134] I reserve leave to apply if any issues arise as to the calculation of the sum due. In the meantime, pursuant to s 43(2)(d) of the Act, I order Mr Withers to pay the trustees and Aorangi a sum equivalent to 50 per cent of their loss.

Negligent misstatement

[135] Having regard to the facts as I have found them to be, I am satisfied that there was sufficient proximity between the Plaintiffs on the one hand and Mr Withers on the other to impose a duty on Mr Withers to take care when giving the undertakings contained in his letters to Orakei of March 2008 and 2009.

[136] Mr Withers knew that his undertakings were required prior to the draw down of the advances and that they would be relied upon by a party lending to the Vintage company. There was reliance in fact. I accept the Plaintiffs' submission that the trustees' and Aorangi's reliance upon Mr Withers' letters was reasonable even though those letters were not addressed to them.

[137] Having found the existence of a duty, I am satisfied that it was breached and that the breach caused loss. Mr Withers pleaded contributory negligence on the part of the Plaintiffs as an affirmative defence. For the reasons given above in the context of the claims under the Act, I am also satisfied as to the merits of this submission.

Third party claim

[138] Mr Withers held a professional indemnity insurance policy with Zurich from 28 June 2009 ("policy"). The policy was renewed annually until cancelled on 28 September 2012. Mr Withers notified Zurich of a possible claim under the policy on 17 December 2010.

[139] The insuring clauses are in section 1 of the policy and provide:[51]

> **1.1 Civil Liability**
>
> Zurich will indemnify the Insured against any civil liability for breach of a duty owed in a professional capacity in connection with the Firm's Business, if a Claim in respect of such breach is first made against an Insured:-
>
> (a) during the Period of Insurance; or
>
> (b) during or after the Period of Insurance and the Claim arises from a Reported Circumstance.
>
> **1.2 Defence Costs**
>
> Zurich will also indemnify the Insured against Defence Costs:-
>
> (i) for any Claim covered by this Policy; or
>
> (ii) relating to any Reported Circumstance.

[140] Zurich declined to indemnify Mr Withers on several grounds but pursued only two of these at trial. These were that cover was excluded by two exclusions in the "Exclusions" section of the policy, being clause 4.1 (Prior Claims and Circumstances), and alternatively by clause 4.3 (Dishonesty).

[141] In support of its submissions Zurich relied on evidence given by Mr McKay, to whom I referred above. Mr McKay is an experienced chartered accountant and gave evidence as to how a prudent and honest chartered accountant, asked to provide the undertakings at issue in this proceeding, would have conducted themselves and what a reasonable chartered accountant might have been expected to know as of 28 June 2009. That date is relevant for the purposes of Zurich's submission on clause 4.1.

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[51] Ikon Chartered Accountants Insurance Policy, Vol 5 at 1461.

[142] With no disrespect to Mr McKay, I have determined the issues which arise by reference to the factual evidence before me. I am not satisfied that the application of the various provisions in the policy is affected in this instance by the professional standards of the New Zealand Institute of Chartered Accountants.

Clause 4.1

[143] Clause 4.1 provides:[52]

> Zurich will not indemnify [Mr Withers] against any liability or Claim (or related Defence Costs) arising from:
>
> **4.1 Prior Claims and Circumstances**
>
> (a) any Claim or Circumstance of which the Insured knew, or a reasonable person in the Circumstances could be expected to have known, prior to the Period of Insurance, to be Circumstances likely to give rise to a Claim against the Insured in respect of civil liability or loss;

[144] Circumstance is defined in clause 7.2 of the policy as:[53]

> **7.2 Circumstance**
>
> … an incident, occurrence, fact or matter which may or does give rise to a Claim.

[145] "Likely" in this context means that there is a "real risk of a claim being made" or that a claim "could well" be made.[54]

[146] As I have said, the period of insurance commenced on 28 June 2009. Accordingly, indemnity is excluded by clause 4.1(a) if I find that the Plaintiffs' claims arise from a circumstance which Mr Withers knew, or that a reasonable person in the circumstances could be expected have to known, by 28 June 2009, to be circumstances likely to give rise to a claim against Mr Withers.

[147] Zurich submitted that the requirements of clause 4.1(a) were met. Mr Withers gave the undertakings annually from 2001. Prior to March 2009 he

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52 At 1466.
53 At 1472.
54 *Sinclair v Horder O'Malley & Co v The National Insurance Co of New Zealand Ltd* (1992) 7 ANZ Insurance Cases 61-098 at 77,403-77,404.

made no enquiry of the Vegars as to the accuracy of the statements made in the letters, nor ensured that funds in the costs accounts were applied to in accordance with his letters. Mr Withers knew the Vegars' interests were complex, bordering on "risky".

[148] Zurich also relied upon the fact that, as of March 2009, several invoices rendered by Mr Withers' firm to Vegar entitles remained outstanding. I place no reliance on this latter point. The fees outstanding comprise some $15,000, more than $5,000 of which had been rendered that month.

[149] I accept Mr Withers' evidence that it was not until his discussion with Mr Taylforth on 16 December 2010 that he knew of circumstances likely to give rise to a claim. Plainly, Mr Withers was on enquiry in July 2010, following receipt of correspondence from the IRD as to the outstanding GST due from the 07 companies. I accept Mr Withers' evidence, however, that he was assured at that time that all outstanding loans had been repaid.

[150] I am also not satisfied that a reasonable person in the circumstances which existed as at 28 June 2009 could have been expected to know that a claim was likely within the meaning of clause 4.1(a) of the policy. No default had occurred and therefore no loss had been suffered. Concern as to whether the costs accounts were being operated as intended is not sufficient for the purposes of clause 4.1(a).

Clause 4.3/Clause 2.2

[151] Alternatively, Zurich relies on clause 4.3 of the policy. This provision is concerned with disentitling conduct on the part of an insured and it provides:[55]

> Zurich will not indemnify [Mr Withers] against any liability or Claim (or related Defence Costs) arising from:
>
> **4.3 Dishonesty**
>
> (a) arising out of or connected with any actual or alleged dishonest, fraudulent, criminal, or malicious act or omission of any Insured or their consultants, contractors, sub-contractors or agents; or

[55] Ikon Chartered Accountants Insurance Policy, Vol 5 at 1466.

(b) arising out of or connected a wilful breach of any statute, contract or duty, or any act or omission committed or omitted or alleged to have been committed or omitted with a reckless disregard for the consequences by the Insured or their consultants, contractors, sub-contractors or agents; or

Except to the extent to which cover is provided under Automatic Extension 2.4 (Dishonesty).[56]

[152] Zurich contends that the claim against Mr Withers arises from his "dishonest" act or omission, or one committed or omitted by him "with a reckless disregard for the consequences". For the avoidance of doubt, Zurich does not contend that Mr Withers' conduct was fraudulent, criminal, malicious or intended.

[153] Both counsel for the Plaintiffs and Mr Withers submitted, however, that clause 4.3 has no application in the present case, given that I have found Mr Withers' liable in respect of the trustees' and Aorangi's claims under the Act. This submission is based on clause 2.2 of the policy. Clause 2.2 is in that section of the policy comprising (20) "Automatic extensions".

[154] Clause 2.2 provides:[57]

The following extensions to the Policy are included automatically.

Each extension is subject (except to the extent that they may be varied by the extension) to the terms, conditions, limitations and exclusions of this Policy (including the Insuring Clauses).

The inclusion of these extensions (with the exception of Automatic extension 2.17) does not increase s the Limit of Indemnity.

…

2.2 Fair Trading Act

Zurich will indemnify the Insured against any civil liability arising out of a breach of Sections 9 to 14 of the Fair Trading Act 1986 (or any similar fair trading legislation in the States or Territories of the Commonwealth of Australia), in respect of any conduct alleged to have been misleading or deceptive or likely to mislead or deceive, PROVIDED THAT Zurich will not Indemnify the Insured where such liability arises from conduct which was dishonest, fraudulent, criminal, malicious or intended by the Insured.

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56 Automatic Extension 2.4 is not relevant to the present case.

57 Ikon Chartered Accountants Insurance Policy, Vol 5 at 1461.

[155] On the face of clause 2.2, Mr Withers is entitled to indemnity in respect of his liability under the Act unless that liability arises from conduct which was dishonest within the meaning of the clause. That is, Zurich could not avoid cover on the ground that Mr Withers was reckless, as it might under clause 4.3 (assuming that there was such recklessness). Accordingly, it is necessary to determine whether the operation of clause 2.2 excludes clause 4.3.

[156] In *Trustees Executors Limited v QBE Insurance (International) Limited*, the Court of Appeal held:[58]

> [38] The rules of construction for insurance contracts are the same as those for ordinary contracts. Accordingly, this Court recently stated in Lumley General Insurance (NZ) Ltd v Body Corporate No. 205963, when examining the interpretation of exclusion clauses in insurance contracts, that the overall objective must be to ascertain the mutual intention of the parties:
>
> > We agree that, as an exclusion clause, [the clause] should be construed narrowly. But that does not mean a strained interpretation is to be adopted. The overall objective is to ascertain the presumed mutual intention of the parties.

[157] The opening words of section 2 of the policy, which is concerned with "Automatic Extensions", provides:[59]

> Each extension is subject (except to the extent that they may be varied by the extension) to … exclusions of this Policy

[158] It is apparent from these words that an extension in section 2 of the policy may vary a general exclusion in section 4. I accept the submission made by counsel for the Plaintiffs and for Mr Withers that this is the effect of clause 2.2. No purpose would be served by extending cover under clause 2.2, subject to dishonesty etc, if cover were able to be further excluded under clause 4.3 on the grounds of recklessness. Accordingly, as a matter of construction, I consider that Zurich is required to indemnify Mr Withers in respect of liability under the Act unless that liability arises from conduct that was or is dishonest. Recklessness will not suffice when indemnity is sought pursuant to clause 2.2 of the policy.

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58 *Trustees Executors Limited v QBE Insurance (International) Limited* (2010) 16 ANZ Ins Cas 61-874, at [38] (footnotes omitted).

59 Ikon Chartered Accountants Insurance Policy, Vol 5 at 1461.

Dishonesty

[159] There is no dispute that the test for dishonesty is as follows:[60]

> [18] ... Conduct is dishonest if it is both deliberate and underhand or not straight forward. It need not be motivated by intention to deceive. Although dishonesty is a subjective mental state, the law uses an objective standard to measure it: the person's subjective knowledge must make his or her conduct dishonest by normally accepted standards. The civil standard applies but the Court recognises the seriousness of the allegation when assessing proof.

[160] This test contains both a subjective and an objective element. It is first necessary to determine what Mr Withers knew or understood as a matter of fact. It is then necessary to determine whether, having regard to that knowledge and understanding, Mr Withers' conduct was dishonest by normally accepted standards.

[161] Mr Withers' evidence was that he misunderstood the contents of his letters.[61] His evidence was that he believed that he was required to be a signatory on the costs accounts, not that he was required to sign every cheque.[62]

[162] There is force in Zurich's submission that Mr Withers must have understood the meaning of his letters. Mr Withers was an experienced accountant and he had provided the letters over the course of many years.

[163] The critical matter, however, is Mr Withers' email to Jean Vegar in March 2009. The inference I draw from that email is that it was only at that time that Mr Withers understood the implications of his letters. There was no reason for Mr Withers to send the email otherwise.

[164] Mr Withers' explanation for not persisting in seeking a reply to that email was that he overlooked the matter. His practice was in the course of filing numerous tax returns for many clients in advance of the 31 March deadline and that consumed his attention at the time.

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60 *IAG New Zealand Limited v Jackson* [2013] NZCA 302 at [18].
61 Evidence of M D Withers at 161.
62 At 164.

[165] Given my findings as to his state of knowledge, I am not satisfied that Mr Withers' conduct was dishonest within the meaning of clause 2.2 of the policy.

[166] The consequence of that determination is that Zurich is required to indemnify Mr Withers under the policy in respect of his liability to the trustees and Aorangi under the Act.

Result

[167] The First and Second Plaintiffs succeed on their claims against the Defendant pursuant to s 43(1) of the Act.

[168] Pursuant to s 43(2)(d) of the Fair Trading Act 1986, I order the Defendant to pay the First and Second Plaintiffs a sum equivalent to 50 per cent of their loss.

[169] I reserve leave to apply but in the absence of such application, I find that the Plaintiffs' (total) loss comprises $2,620,000 plus interest at the rates and for the periods referred to in [126] above.

[170] The Third Party is required to indemnify the Defendant in respect of his liability to the First and Second Plaintiffs.

[171] I make no order as to costs at present. The parties may submit memoranda if they are unable to agree the matter.

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M Peters J